IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1142 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

BHPATBHARTHI KHODABHARTHI BAVAJI

Appearance:

MS KATHABEN GAJJAR, ADDL. PUBLIC PROSECUTOR FOR THE APPELLANT.

NOTICE SERVED ON RESPONDENTS NOS. 1, 2, 3, 4

CORAM : MR.JUSTICE H.H.MEHTA

Date of decision: 10/03/2000

C.A.V. JUDGEMENT

#. This is an appeal directed against the impugned judgment dated 10-8-1992 in Criminal Case No. 919 of 1989 rendered by the learned Judicial Magistrate First

Class, Dhari. By that judgment the learned Magistrate has acquitted the accused. This appeal is filed u/s. 378(1) Cr.P.C. 1973 by the State of Gujarat.

The respondents in this case were the accused in

said Criminal Case No. 919 of 1989.

#. Brief facts of the case as revealed in the complaint are as follows:-

Accused No.1 is a father-in-law of accused No.2 and grandfather of accused Nos. 3 and 4. On or about 15-9-1989 in the morning hours complainant Aatmaram Ramdas Gondaliya was there in his house in village Bhad, Taluka Khambha. He received an information that there was quarrel in between accused No. 2 and complainant's brother Pragdas and therefore at about 9.00 a.m. he left his house for village Vankia and he reached to the house of his brother Pragdas. His brother was not present but mother of the complainant Somben was present and therefore complainant enquired from his mother. His mother informed complainant that Pragdas had not returned to home since last evening and there was a quarrel in between Bhanubharti and Pragdas.

Thereafter the complainant left the house of his brother Pragdas and he reached to his field which was at a little distance from village Vankia. When he was about to go to his field, it was about 10.15 a.m. The complainant's way leading to his field was passing nearby the house of Bhanubharti and therefore when he was passing on that way to his field and when he was about to reach near the house of Bhanubharti, Bhanuben, wife of Bhanubharthi and her daughter Jyotsna were present. Bhanuben and Jyotsna informed the complainant to persuade Pragdas, otherwise, he (the complainant) would also be beaten and by saying this, abuses were given to the complainant. Without giving any attention to this short incident, the complainant went to his field and at about 11.00 a.m. when he was returning from his field and when he was about to reach near the house of Bhanubharti, all the four accused were found present. As per the case of the complainant, accused No.4 had an axe with him. Bhanuben had stick (Badio) with her. Accused No.1 was not having any article with him but accused No.3 had stones in her hands. When complainant was passing nearby the temple of Ramdev Pir, Bhanuben, the wife of Bhanubharti inflicted a blow of stick (badio) on the back portion of the complainant and questioned him as to where he was going and that she wanted to beat him. Meanwhile,

Kishorebharti accused No.4 came there with an axe in his hand. He told the complainant that he wanted to kill him and by saying so he inflicted a blow of axe which struck at the elbow portion of the right hand of complainant. At that time Bhupatbharti accused No.1 caught hold the complainant from his neck and accused No.2 Bhanuben started to beat the complainant with the stick (Badio), as a result of which the complainant sustained injuries on the fingers of right hand and wrist of left hand. At that time accused No.3 started to beat the complainant by fists and kicks. The complainant shouted for help and on hearing that shouts one Narsi Bhaya Vaghri who was present in the nearby field rushed to the complainant and rescued the complainant from further beating. At that time Kishorebharti accused No.4 was telling that on that day the complainant was saved but if he would find the complainant again, the complainant would be killed and while giving intimidation and abuses, all the accused went away.

Narsi Bhaya Vaghri who came from the nearby field took the complainant and dropped the complainant at his house. One Harivallabhdas was present and he was informed about the incident. Harivallabhdas took complainant to Government Dispensary at village Khambha. When complainant was in the Government Dispensary, he gave his complaint against the accused to P.S.I. Khambha.

It is the case of the complainant that incident of this case occurred as a result of quarrel which took place on the previous day and all the accused had come with a common intention to beat the complainant.

The complaint of the complainant lodged before the P.S.I. Khambha was registered in Khambha Police Station at about 14.15 hours on that very day. The Police Sub Inspector investigated that case and ultimately charge sheet was filed against the accused and that charge sheet came to be registered as Criminal Case No. 919 of 1989 in the Court of learned J.M.F.C., Dhari.

#. The learned Magistrate on the basis of Police papers framed a charge at Exh. 21 against accused for offences punishable under Section 323, 324, 504, 506(2) read with 114 of the I.P.C. and also under Section 135 of the Bombay Police Act. The prosecution examined ten witnesses in support of the case and led documentary evidence also. After appreciating the evidence led by the prosecution and after hearing the learned advocates for both the parties, the learned Magistrate reached to a

conclusion that the prosecution has failed to prove the case against the accused for which a charge has been framed, beyond reasonable doubt and therefore by rendering his judgment on 10-8-1992 he acquitted all the four accused.

#. Being aggrieved against and dissatisfied with the said order the State Government has preferred this present appeal.

#. Before considering the submissions made by the learned A.P.P. it would be necessary to know as to what type of evidence has been led by the prosecution. The prosecution has examined the following witnesses:

P.W.1 Dr. H.K.Gohil (Exh. 40) was a Medical Officer in Cottage Hospital of village Khambha. He had examined the complainant at about 1.30 p.m. on 15-9-1989 and he found about ten injuries on the person of the complainant for which he has issued a medical certificate Exh. 42.

P.W.2 Aatmaram Ramdas Gondaliya (Complainant) (Exh. 51). He has proved his complaint Exh. 52.

P.W.3 Narsi Bhaya who rescued complainant from further beating by the accused (Exh.54)

P.W.4 Valji Daya (Exh. 57) was a panch witness for panchnama (Exh.58) under which accused No.2 Bhanuben produced a muddamal stick and accused No.2 and 3 were arrested.

P.W.5 Maganbhai Nagjibhai. He is another panch for aforesaid panchnama (Exh.58).

P.W.6 Gova Jetha (Exh. 63) was a panch witness for panchnama (Exh.64) which is for scene of offence.

P.W.7 Chhaganbhai Jenabhai (Exh. 55). He is another panch for aforesaid Panchnama (Exh.64).

P.W.8 Rambhai Devraj (Exh. 69) was a panch witness for panchnama (Exh. 70) under which clothes put on by the complainant at the time of incident were seized in the hospital at Khamba.

P.W.9 Harivallabhdas Ramdas (Exh. 72). He is a brother of complainant to whom the complainant narrated the incident.

P.W.10 Laxmichand Jairambhai Hingrajia (Exh.78). He is the investigating Officer.

#. In this appeal proceeding no one has appeared for the respondents-accused, though they were duly served and therefore I have heard Ms. Kathaben Gajjar, ld. APP for the appellant. She has taken me through only the judgment (Exh. 87) which is challenged in this appeal. As she has not read and commented the evidence of any

witness this Court has gone through the evidence led by the prosecution. After reading the judgment by learned APP this court had put a specific query to learned APP and asked her to satisfy this Court as to how the judgment challenged in this appeal is erroneous and wrong.

#. She has drawn my attention to an observation of the learned Magistrate in paragraph 7 of the judgment. The learned Magistrate has observed that an evidence of Medical Officer is an evidence of expert and that evidence is led for giving support to the evidence of complainant, and further that Medical Officer has been examined prior to an evidence of complainant was recorded and after recording the evidence of Medical Officer, the complainant's evidence has been recorded and therefore the learned Magistrate has observed that the complainant has given an evidence in consonance with an evidence of medical expert. By showing this type of evidence, the learned APP has argued that it makes no difference if Medical Officer is examined prior to the complainant. The evidence is to be appreciated separately and therefore this observation is not correct. This Court is of the view that the submission of learned APP is correct, but at the same time this Court has found that the learned Magistrate has not reached to his conclusion for acquittal merely on the basis of this type of lapse committed by the prosecution.

#. She has further argued that witness Harivallabhdas was an eye witness to the incident and his evidence should be accepted. Harivallabhdas Ramdas is a brother of the complainant. He has admitted that the incident occurred at about 11.00 a.m. before three years near temple of Pir and at that time he was there at his residence. He has further deposed that Narsi Bhaya in company of his brother Aatmaram, came to his house and thereafter his brother narrated the incident to him and therefore it is not correct to argue that Harivallabhdas was an eye-witness to the incident. He is a witness to whom the incident was narrated by the complainant after the incident. As per his evidence complainant told him that when he was returning from his field to his house all the accused met him and they gave abuses to him and Bhupatbhai Aatmaram i.e., accused No.1 caught hold of him and Kishorebhai inflicted a blow of an axe and that blow caused an injury at the upper portion of the elbow of his right hand. He has further deposed that his brother told him that Jyotsnaben had stones with her and her mother had a badio, i.e., stick with her. His brother also told him that as there was a hubub and shouting by him Narsi

Bhaya who was grazing the goats in the field rushed to him and separated the complainant from the scuffle and brought him to his house. Thereafter this witness Harivallabhdas took the complainant to Government Dispensary at Khambha, where the complainant lodged his complaint. So from evidence of this Harivallabhdas to whom the facts were narrated at the earliest point of time by the complainant, it appears that he has deposed that accused No.2 Bhanuben had a stick and she was beating him. Under the circumstances, the evidence of Harivallabhdas is not an evidence of eye witness. At the best his evidence can be relevant under section 157 read with Section 6 of the Indian Evidence Act. His evidence can only be accepted if an evidence of complainant is accepted, otherwise it is of no use to rely only on the words of Harivallabhdas that complainant narrated the facts relating to the incident.

#. The learned APP has further argued that there is no reason to disbelieve Harivallabhdas. After all he is a brother of complainant and therefore naturally he would be an interested witness and he would like to see that anyhow the version of his brother might be accepted by the Court. If we read cross-examination of this witness Harivallabhdas, we find that Narsi Bhaya brought the complainant to his house at about 11.00 a.m. Thereafter, by bus which left at about 11.45 p.m. they went to village Khambha. First complainant and he both went to police station and complaint met the Police Sub Inspector. Complainant narrated the incident to Police Sub Inspector and complaint was written by the Police Sub Inspector. In fact case is otherwise, because as per the say of the complainant his brother brought him to Government Dispensary first and Police Sub Inspector came to dispensary and he lodged complaint in the hospital and therefore in this case complaint Exh. 52 which is alleged to have been given in the hospital cannot be said to be a First Information Report because as per an evidence of Harivallabhdas, complainant gave his complaint in the Police Station and after lodging the complaint Police Sub Inspector brought the complainant and his brother by jeep to Government Dispensary and therefore the information received by the Police Sub Inspector in the Police Station is first information which was reduced into writing and that First Information Report is not comingforth on record and therefore F.I.R (Exh. 52) which is branded as F.I.R. is merely a police statement under Section 161 and 162 Cr.P.C.

##. Learned A.P.P. has argued that lodging a complaint in the Police Station as stated by Harivallabhdas is a

minor discrepancy and that should not be taken into account while appreciating the evidence. She has further argued that as per an evidence of Harivallabhdas, accused No.1 caught hold the complainant and accused No.4 gave an axe blow, which struck on the upper part of the elbow of the right hand. She has fairly admitted that on reading an evidence of complainant, it is crystal clear that the complainant has specifically deposed in his evidence that accused No.3 Jyotsnaben did not beat him either by badio or stones and therefore she has fairly conceded that there is no case against accused No.3 and she does not press an order of acquittal against accused No.3. Taking into consideration this very fact, an evidence of complainant becomes doubtful because in complaint (Exh. 52) complainant has stated that Jyotsnaben had beaten him by fists and kicks and therefore it appears that the complainant has involved Jyotsnaben falsely because in evidence he has deposed that Jyotsnaben did not beat him either by badio or by stones and thus this complainant is a person who has involved accused No.3 falsely and therefore an evidence of complainant is not trustworthy and reliable. It does not inspire confidence.

##. The learned Magistrate has, in paragraph 7 of his judgment, discussed the evidence of complainant by taking into account the evidence of Medical Officer. As per the evidence of Medical Officer injury No.1 on the upper part of an elbow of right hand could only be caused by sharp cutting instrument like knife. As per his evidence looking to nature of injury No.1, the blade of the instrument must be sharp and cutting while complainant has, by observing muddamal article axe in the court, deposed that the blade of the axe before the court was blunt. When prosecution has come with a specific case that injury No.1 on the upper part of an elbow joint of right hand of the complainant was caused by muddamal article axe then from the evidence of complainant it is proved that muddamal article axe was not used in the incident. The learned Magistrate has also observed in his judgment that complainant has not given any evidence to explain the injuries on his body in respect of injuries Nos. 8, 9 and 10 stated in the medical certificate (Exh. 42).

The learned Magistrate has discussed an evidence with regard to kurta which was put on by the complainant at the time of incident. As per the evidence of the complainant only one blow was given on the upper part of an elbow joint of the right hand and therefore there should be only one cut on the right sleeve of that kurta. The learned Magistrate has observed in his judgment that

on seeing that kurta which was before the court, it was torn at more than one part and therefore he has observed that evidence is also contradictory and under the circumstances he has not believed the complainant. It is not the case of the appellant that the learned Magistrate has not appreciated the evidence of complainant by taking into consideration the other evidence on record. He has given cogent reasons for not believing the complainant. When evidence of complainant is not believed by the learned Magistrate, then an evidence of Narsi Bhaya who came later on cannot be believed. P.W. 3 Narsi Bhaya has admitted in his evidence that on the date of incident he was working in the field of one Gopalbhai Valji and the incident took place in between Ramdev Pir Temple and field of Gopalbhai i.e. the field in which he was working. He has further deposed that he heard the shouts for rescue when he was working in the field and further that field of Gopal is at a distance of about 200 metres from the field of complainant. Under the circumstances, he was not an eye witness to the incident when incident occurred. As per his evidence he heard the shouts and when he came to temple of Ramdev Pir he saw that accused party and complainant were scuffling and at that time he was at a distance of about 10' and he saw that accused No.4 Kishorebharti inflicted a blow of axe which caused an injury on the upper part of right elbow of the complainant and at that time accused NO. 2 Bhanuben was beating the complainant with Badio and thereafter he separated the accused and the complainant. Thus an attempt has been made by the prosecution that this witness is an eye witness to the incident, but looking to his cross-examination, he came to complainant later on after the incident took place.

##. P.W. 4 Valjibhai Dayabhai, P.W.5. Maganbhai Nagjibhai, P.W. 6 Gova Jetha and P.W.7 Chhaganbhai Jenabhai were panch witnesses and all the panch witnesses had turned hostile and they have not supported the case of the prosecution. By seeking permission of the trial court, the learned APP before the Lower court had cross-examined these witnesses but nothing material has come out from their evidence. P.W. 8 Rambhai Devraj was a panch witness for panchnama Exh 70 under which the clothes of the complainant were seized. P.W. 9 Harivallabhdas Ramdas who happens to be the brother of the complainant was, as discussed earlier, was not an eye witness to the incident. Witness No. 10 Laxmichand Jeram Hingrajia was Investigating Officer. From his evidence it appears that accused No.1 Bhupatbharti has lodged complaint against him and enquiry on the basis of that complaint against him is pending in the court and

therefore an attempt has been made by accused party to show that investigating officer had some inimical relation with the accused and therefore no honest investigation has been carried out.

##. Thus, the learned Magistrate has by giving cogent reasons came to the conclusion that prosecution has failed to prove the case against accused for which charge has been framed against them. The conclusion reached by him is based on plausible reasons. Even if this Court comes to any other conclusion and if this Court finds that reasons given by the learned Magistrate are also plausible then this Court cannot substitute its own decision in place of the decision arrived at by the learned Magistrate, who recorded evidence.

##. In case of Ramesh Babulal Doshi v. The State of Gujarat 1996(2) GLH 206 the Honourable Supreme Court has laid down certain principles in nature of guidelines with regard to powers of the High Court while dealing with acquittal appeals before it. In paragraph 7, the Hon'ble Supreme Court has held as follows:-

"Before proceeding further it will be pertinent to mention that the entire approach of the High Court in dealing with the appeal was patently wrong for it did not at all address itself to the question as to whether the reasons which weighed with the trial court for recording the order of acquittal were proper or not. Instead thereof the High Court made an independent reappraisal ofthe entire evidence to arrive at the above quoted conclusions. This Court has repeatedly laid down that he mere fact that a view other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusion arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds for

> reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then and then only reappraise the evidence to arrive at its own conclusions. Keeping in with the above principles we have therefore to first ascertain whether the findings of the trial court are sustainable or not."

##. In view of the above legal position, the appellant must satisfy this court that (1) the entire approach of the trial court dealing with the evidence was patently illegal or (2) the conclusions arrived at were wholly untenable, or (3) the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. The learned APP who represents the cause of appellant has not satisfied this Court by commenting the evidence of the witnesses to prove any of the above situations. This court itself has perused the evidence of the witnesses and it is satisfied that the judgment cannot be said to be erroneous or wrong. Whatever the reasons are assigned by the learned Magistrate are plausible, considering the other evidence on record and therefore in this appeal this Court finds that there are no other circumstances to differ with the views expressed by the learned Magistrate.

##. In view of the discussion made hereinabove, there is no merit in this appeal and it deserves to be dismissed and therefore accordingly this appeal is dismissed by confirming the acquittal order rendered in Criminal Case No. 919 of 1989 by the learned Judicial Magistrate, Dhari.

(H.H. Mehta, J)